COPY

FILED
APR 1 1955
HAROLD B. WILLEY, C

In

The Supreme Court

of the United States

OCTOBER TERM, 1954

No. 631

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

DONALD A. SCHAFER,
JAMES P. CRONAN, JR.,
803 Public Service Building,
Portland 4, Oregon,
Counsel for Petitioner.

BLASS-KEYSTONE PRESS

BLEED THROUGH POOR COPY

In
The Supreme Court
of the United States

OCTOBER TERM, 1954

No. 631

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Petitioner,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

To The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

The petition heretofore filed seeks the granting of a Writ of Certiorari principally upon the ground that the violation of the Federal Motor Carrier Act here involved is enough to confer federal jurisdiction of a private action for damages, in the absence of diversity (see "Question Presented", Pet. p. 2). Alternatively, we suggested that, if the lower Courts were right in holding that the complaint was really seeking to enforce common law remedies, a federal question was presented because this Court had so held nearly forty years ago (Pet. 10-15). In its

brief, respondent gives its summary of the complaint (Br. 2-4) and concludes, based on the summary, that petitioner was not relying on any Act of Congress (Br. p. 6). As to the common law point, respondent urges that this Court's opinions on which we rely decided merely that actions for violations of the Interstate Commerce Act might be prosecuted in state courts. We desire briefly to reply to these two points.

We agree that it is quite possible to conclude that petitioner's complaint did not rely on any Act of Congress *if* respondent's summary (Br. 2-4) of the complaint is accurate. Respondent, however, did not accurately summarize the complaint.

As pointed out in the first paragraph of our Statement of the Case (Pet. p. 3) the complaint alleges that: (1) petitioner transported property for compensation interstate over a designated highway by express permission of the Interstate Commerce Commission obtained as required by law; (2) respondent transported property for compensation interstate over the same highway without such permission; and (3) such unlawful operations of respondent were directly competitive with petitioner's operations and resulted in a diversion of traffic so that petitioner was entitled to money damages for "such illegal operations".

In addition to the pleaded violation of the Federal Motor Carrier Act, petitioner pleaded in *haac verba* 28 U.S.C. Sec. 1337 which gives the district courts original jurisdiction of civil actions arising under Acts of Congress regulating commerce. In other words, petitioner contended, based on the complaint, that the action "arose" because the Act was violated.

In its summary of the complaint respondent quotes exactly Paragraph III of the complaint (the in *haac verba* pleading of 28 U.S.C. Section 1337), but omits (1) that portion of Paragraph IV which alleges that petitioner's certificate of public convenience and necessity was issued pursuant to the requirements of the Interstate Commerce Act; (2) that portion of Paragraph V which

BLEED THROUGH POOR COPY

alleged that the Interstate Commerce Act required respondent to have a certificate of public convenience and necessity; and (3) the characterizations of respondent's activities in Paragraphs VI and VII as "unlawful". Thus respondent in summarizing the complaint has included the allegation of 28 U.S.C. Section 1337, but has left out the allegations that respondent violated the Act. This probably permits respondent's conclusions that "There is no allegation in the complaint that petitioner claims a right of action by virtue of any Act of Congress; . . ." and ". . . petitioner in its complaint and in the District Court claimed no federal right of action by virtue of any Act of Congress, . . ." (Br. p. 6). We submit, however, that the conclusions are unwarranted because they rest upon a complaint which respondent has "amended" to remove one-half of the jurisdictional allegations. This is so particularly because of the elementary rule of law (requiring, we think, no citation of authority) that upon a Motion to Dismiss (as here) all allegations of the complaint must be taken to be true.

Respondent's other contention with which we wish to deal briefly is that this Court in *Penna. R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121 and *Penna. R.R. Co.* v. *Sonman Coal Co.*, 242 U.S. 120, decided only that actions for violations of the Interstate Commerce Act might be asserted in state courts. Federal courts already had jurisdiction of such actions, contends respondent, because of the express grant of jurisdiction contained in Sections 8 and 9 of 49 U.S.C. But because Section 22 of 49 U.S.C. reserved common law remedies, respondent claims this Court held that section permitted actions for violation of the Act to be asserted in state courts (Br. 6-8).

We believe the answer to this argument is contained *in extenso* in the Petition (10-15). Suffice it to say here only that it is obvious this Court was not dealing with statutory violations in deciding the *Puritan* and *Sonman* cases. It was dealing with failures to perform common law duties. It *held* that such failures

were actionable in state courts and said by way of *dicta* that they were actionable in federal courts. But in both the *Puritan* and *Sonman* cases the dicta appear in non-diversity cases (Pet. App. C). This is a non-diversity case and, if the lower Courts were right, and if respondent is right (Br. p. 9), it also involves a complaint founded upon the common law.

Conclusion

For the reasons stated in the Petition, the Writ should issue.

Respectfully submitted,

DONALD A. SCHAFER,
JAMES P. CRONAN, JR.,
803 Public Service Bldg.,
Portland 4, Oregon,
Counsel for Petitioner.

March 30, 1955.

BLEED THROUGH POOR COPY